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No. 76-361

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
October Term, 1976

D.I.Z. LIVESTOCK CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion and order of the United States Court of Claims is unreported (Pet. App. A-1 to A-5).

JURISDICTION

The order of the United States Court of Claims was entered on June 11, 1976. The petition for a writ of certiorari was filed on September 9, 1976. The jurisdiction of this Court properly is invoked under 28 U.S.C. 1255(1).¹

QUESTION PRESENTED

Whether the United States breached certain agreements relating to the leasing of petitioners' interests in

¹Petitioners allege jurisdiction under 28 U.S.C. 1257(3) (Pet. 2), but this deals only with final judgments or decrees rendered by the highest court of a state.

certain land, and, if so, whether petitioners have suffered any damages by reason of the alleged breach.

STATEMENT

After World War II the United States entered into certain "lease and suspension agreements" with petitioners and their predecessors in interest (hereinafter "petitioners"), which provided for the government's leasing of certain land in New Mexico (comprising part of the White Sands Missile Range) that the petitioners had previously used for ranching. The land in question consisted of land owned by petitioners, land leased by petitioners from the State of New Mexico, and land owned by the United States but used by petitioners pursuant to grazing permits issued under the Taylor Grazing Act, 48 Stat. 1269 *et seq.*, as amended, 43 U.S.C. 315 *et seq.*

Each lease and suspension agreement provided that, for an established annual rental, the United States obtained possession of " * * * all right or privileges [petitioners] posses[s] to the following described premises for the Government's full and unrestricted use * * * ." In each case the "premises" included private land, leased state land, and federal land on which petitioners had grazing rights. Each agreement required the government to surrender possession of the premises upon expiration or termination of the agreement. Each agreement also provided in Section 9:

The Government recognizes that this transaction shall be without prejudice to the position of the [petitioners] in any application for grazing privileges made when and to the extent that the herein described lands are returned to federal grazing administration.

Finally, the agreements recited in Section 15:

This agreement is made pursuant to authority of the Act of 9 July 1942, (Public No. 663, 77th Congress) as amended 28 May 1948 (43 USC 315q).

In 1952, the Secretary of the Interior withdrew all of the federal lands in question from appropriation under the public land laws and reserved them for the Department of the Army's military use. See Public Land Order 833, 17 Fed. Reg. 4822-4823. The existing federal grazing permits issued under the Taylor Grazing Act expired by their terms and, in light of Public Land Order 833, were not renewed.² That public land order remains in effect.

The United States continued its possession and payment of rental through the 1970 termination date specified in the lease and suspension agreements. Prior to or coincident with that termination, the United States condemned an annual leasehold, extendible at the government's option until June 30, 1980, in the land owned by petitioners or leased by them from the State of New Mexico. Declarations of taking and deposits of estimated compensation were filed on July 1, 1970, immediately following the expiration of the lease and suspension agreements.

Petitioners, as defendants in the condemnation action, challenged the authority of the United States to condemn their private and leased state land on several theories. The district court, in a memorandum opinion, rejected petitioner's contentions. The court ruled that no federal

²Although the specified effective dates of grazing permits existing on May 27, 1952, does not appear from the record, all existing permits had to expire by May 26, 1962, long before termination of the lease and suspension agreements, because the maximum permitted term of such a permit is 10 years, 43 U.S.C. 315b.

ARGUMENT

grazing land was being condemned, that it was clear that all Taylor Grazing Act permits had been previously cancelled, and that the United States was not estopped from condemning petitioners' interests in the non-federal lands. The court also held that claims against the United States for breach of the lease and suspension agreements, if any, could not be raised in the condemnation action. *United States v. 40,021.64 Acres, Dona Ana, Otero and Sierra Counties, New Mexico, et al.*, D. N. Mex., 8527 Civil, et al. (June 3, 1971). (Copy attached.) Petitioners did not appeal.

Petitioners brought this suit in the Court of Claims for damages for breach of the lease and suspension agreements and for compensation under 43 U.S.C. 315q (for the same amount as the damage claim) for the military use of the land covered by their federal grazing permits.³

The Court of Claims granted the government's motion for summary judgment. The court held that petitioners cannot recover under either the lease and suspension agreements or the Taylor Grazing Act. The court reasoned that although the United States was " * * * perhaps guilty of a technical breach of the 'lease and suspension' agreements, [petitioners] have suffered no compensable loss from this breach" (Pet. App. A-4). The court also concluded that the Department of the Army had properly determined the rental payments under the agreements were intended to include adequate Section 315q compensation and that no additional compensation should be paid under that section. The court found nothing in the record to support petitioners' alleged expectation that additional sums would be forthcoming.

³Section 315q authorizes the "head of the department * * * using the lands," in his discretion, to make payments to persons whose grazing permits are cancelled, in an amount he determines "to be fair and reasonable for the losses suffered."

The Court of Claims correctly determined that petitioners have suffered no damages from the government's action with respect to the land in question. There is no conflict among the federal appellate courts and petitioners allege none. The case does not present a recurring issue of national importance.

1. The only land involved in the government's condemnation action was land either owned by petitioners outright or leased by them from the State of New Mexico. In this regard, the Court of Claims correctly held that petitioners have not been injured by the government's alleged breach of its obligation under the lease and suspension agreements to return that land to them. The obligation to return the land arose only upon termination of the agreements. At that time petitioners' contractual right to the land was transformed into a constitutional right to just compensation by the condemnation action. The award in the condemnation case thus substitutes for the private and leased state land. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-326. Petitioners will be compensated fully for the value of their interests in that land.

2. Petitioners' only interest in the federal land arose from grazing permits that have long since terminated. Petitioners contend, however, that Section 10 of the lease and termination agreements, which required the government to "surrender possession of the premises upon expiration or termination of this agreement," created a contractual obligation on the government's part to restore whatever grazing rights petitioners had to the federal land at the time the agreements were executed. But the agreements merely provided (Section 9) that they were to be "without prejudice to the position of the [petitioners] in any application for grazing privileges made when [the lands] * * * are returned to federal grazing administration." The agreement did not contemplate that grazing rights would be automatically restored at the termination of each agreement, but

rather contemplated that petitioners would have to apply for new grazing rights. Therefore, the expiration of petitioners' grazing permits and the 1952 withdrawal of all of the federal lands in question from grazing usage did not abrogate any obligation in the lease and suspension agreements, which were neutral with respect to future grazing activities.

3. Petitioners also claim that they are entitled to compensation under 43 U.S.C. 315q for the termination of their grazing rights. Such compensation is not constitutionally required, *United States v. Fuller*, 409 U.S. 488, but is a matter within the discretion of the Secretary of the Army. The Secretary correctly determined that part of the annual rentals under the agreements were intended to and did compensate petitioners for the loss of grazing rights. As indicated above, the agreements did not preserve petitioners' grazing rights, and Section 15 of each agreement specifically relied on Section 315q, as amended in 1948, as authority for the execution of the agreement.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
JOHN J. ZIMMERMAN,
Attorneys.

DECEMBER 1976.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 8527 CIVIL
UNITED STATES OF AMERICA

v.

40.021.64 ACRES OF LAND, MORE OR LESS, SITUATE IN
DONA ANA, OTERO AND SIERRA COUNTIES, NEW
MEXICO, ET AL.

No. 8541 CIVIL
UNITED STATES OF AMERICA

v.

11,231.20 ACRES OF LAND, MORE OR LESS, SITUATE
IN DONA ANA AND OTERO COUNTIES, STATE OF NEW
MEXICO, ET AL.

No. 8550 CIVIL
UNITED STATES OF AMERICA

v.

41,098.98 ACRES OF LAND, MORE OR LESS, SITUATE IN
SIERRA, SOCORRO, OTERO AND LINCOLN COUNTIES,
STATE OF NEW MEXICO, ET AL.

No. 8551 CIVIL
UNITED STATES OF AMERICA

v.

9,101.24 ACRES OF LAND, MORE OR LESS, SITUATE IN
SIERRA AND OTERO COUNTIES, STATE OF NEW
MEXICO, ET AL.

No. 8555 CIVIL
UNITED STATES OF AMERICA

v.

46,672.96 ACRES OF LAND, MORE OR LESS, SITUATE IN
DONA ANA, SIERRA, OTERO AND SOCORRO COUNTIES,
NEW MEXICO, ET AL.

la

No. 8561 CIVIL
UNITED STATES OF AMERICA

v.

228.099.65 ACRES OF LAND, MORE OR LESS, SITUATE IN
OTERO, SIERRA, LINCOLN AND SOCORRO COUNTIES, NEW
MEXICO, ET AL.

No. 8577 CIVIL
UNITED STATES OF AMERICA

v.

4,910.48 ACRES OF LAND, MORE OR LESS, SITUATE IN
OTERO COUNTY, STATE OF NEW MEXICO, ET AL.

MEMORANDUM OPINION

It is the opinion of the Court that the United States holds the rights in the land in question by virtue of the condemnation proceedings and not by virtue of any lease and suspension agreements. Further, it is the opinion of the Court that the motions of the United States to strike should be granted.

It appears to the Court that the real bone of contention in these cases is the interpretation and effect of the lease dated September 7, 1950. The original lease provided "that this agreement shall, in no event, extend beyond 30 June 1970". The Supplemental Agreement provides "that such agreement shall, in no event, extend beyond 30 June 1970".

Paragraph 11 of the Lease contains the following language: "Provided that in the event any Government property is located on the demised premises at the termination date, the rental will continue until such property is removed, restoration completed as provided for in Article 10 hereof, or a cash settlement and possession tendered to the Grantor."

The defendants are contending that said paragraph 11 has converted the lease into a tenancy from year to year for the reason that they contend that there are certain improvements which were on the premises when the lease expired. The Court has examined the leases very carefully and is of the opinion that the lease and suspension agreements expired according to their terms on June 30, 1970, and there was no holding over and that the government had full right to condemn the land in question. Each of the condemnation actions was filed on or before the date when the lease expired and so there was no notice of holding over nor agreement, expressed or implied, that the government was holding over. In fact, the agreements specifically provide that they shall not extend beyond June 30, 1970. Consequently, the contention of the defendants that there was holding over is not well taken. Their contention that the government was holding the property "under and by virtue of a lease and suspension agreement" is not well founded and the matters which appear on the face of the pleadings bears this out without the taking of any testimony.

The landowners rely heavily on *United States v. 534.7 Acres of Land in Orange County, Florida*, 157 F. 2d 828 (1946). The Court has read and re-read that case and it is the opinion of the Court that the case is not controlling. The Fifth Circuit had this to say:

"The judgment of the court below denying to appellant the right to condemn may have been erroneous, but it concerned a question with respect to which the court below was vested with authority to act. The lower court's right to amend, alter, or change the judgment denying condemnation expired when the term at which the judgment was entered ended; and whether the judgment on that question was right or wrong, the court below no longer had power to change it."

It is apparent that this case does not stand for the claims contended for by the defendants. It merely held that the lower court could not change its judgment after the end of the term of court.

It does hold that the government may not be sued without its consent.

It is clear that we are not concerned here with problems of the Taylor Grazing Act. No Taylor grazing land is being condemned and it is clear that all Taylor grazing permits were previously cancelled. The United States does not have to condemn that which it already owns.

With respect to the Answer filed by the Commissioner of Public Lands, it appears that he is attempting to include certain lands and mineral rights or interests and the Court would have no jurisdiction to enlarge the proceedings. The Declaration will have to speak for itself, but it appears that the taking includes all rights. If there is any question about this, it can be cleared up at the time of the pretrial conference.

With regard to the answers filed by Mr. Hall, it appears that he is raising the bad faith of the government. It appears to the Court that the government is at liberty to condemn the land in question if it so desires and that any priority rights mentioned in the lease have expired and cannot be used at this time upon which to base a claim of bad faith.

As to the claim that there were permanent improvements on the property, the law is well settled that when real estate is taken, it includes any permanent improvements to the property. See *27 Am. Jur. 2d, Eminent Domain*, par. 291, pages 94-99.

As to the claim that there was personal property on the premises, it is clear that the same may be removed by the owner thereof. See *27 Am. Jur. 2d, Eminent Domain*, par. 293, pages 102-105.

Any claims against the United States for breaches of the lease and suspension agreement, if any, cannot be raised in this proceeding.

The motions to strike the defenses of equitable estoppel are granted.

The United States should prepare and present to the Court appropriate orders.

DATED this 3rd day of June, 1971.

UNITED STATES DISTRICT JUDGE